Supreme Court, U.S.
FILED
AUG 16 1993
OFFICE OF THE CLERK

(2)

No. 93-88

In The

Supreme Court of the United States

October Term, 1993

NELSON A. FERNANDES,

Petitioner,

vs.

ROCKAWAY TOWNSHIP TOWN COUNCIL AND TOWNSHIP ENGINEER,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

JOHN H. DORSEY
Counsel of Record
DORSEY AND FISHER
Attorneys for Respondents
714 Main Street
P.O. Box 228
Boonton, New Jersey 07005
(201) 334-1900

DOUGLAS R. CABANA
On the Brief

4086
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

BEST AVAILABLE COPY

28 pp

TABLE OF CONTENTS

Page

Statement of the Case 1

Reasons for Denying the Writ 9

I. There is no jurisdiction to grant a writ of certiorari. 9

II. Matters of state or federal law were correctly decided by the New Jersey courts. 12

Conclusion 16

TABLE OF CONTENTS

Cases Cited:

Cito v. Bridgewater Tp. Police Dept., 892 F.2d 23 (3rd Cir. 1989), *rehearing denied* 15

Herb v. Pitcairn, 65 S. Ct. 459, 324 U.S. 117, 89 L. Ed. 789 (1945) 11

House v. Road Improv. Dist., 45 S. Ct. 60, 266 U.S. 175, 68 L. Ed. 229 (1924) 12

Layne & Bowler Corporation v. Western Well Works, 261 U.S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923) 10

Oroz v. American President Lines, Limited, 259 F.2d 636 (1958), *cert. denied*, 79 S. Ct. 584, 359 U.S. 908, 3 L. Ed. 2d 572 (C.A. N.Y.) 15

Contents

	Page
Rice v. Sioux City Memorial Park Cemetery, 75 S. Ct. 614, 349 U.S. 70, 99 L. Ed. 897 (1955)	10
Wilson v. Garcia, 105 S. Ct. 1938, 471 U.S. 261, 85 L. Ed. 2d 254 (1985)	15
Wilson v. Loew's Inc., 78 S. Ct. 526, 355 U.S. 597, 2 L. Ed. 2d 519 (1958)	11
Statutes Cited:	
N.J.S.A. 40A:12-1 *et seq.*	1, 6
N.J.S.A. 40A:12-13	13
N.J.S.A. 40:12-13(a)	14
N.J.S.A. 58:8-8	15
28 U.S.C. § 1257(3)	11
28 U.S.C. § 1257(a)	11, 12
28 U.S.C. § 2403(b)	12
42 U.S.C. § 1983	6, 12, 15
42 U.S.C. § 2000d	15
United States Constitution Cited:	
Fifth Amendment	6

Contents

	Page
Fourteenth Amendment	10
Rules Cited:	
United States Supreme Court Rules:	
Rule 10.1	9
Rule 29.4(c)	12
APPENDIX	
Appendix A — Order of the United States District Court for the District of New Jersey Filed November 29, 1991 ..	1a
Appendix B — Order of the United States District Court for the District of New Jersey Filed September 23, 1991 ..	6a

No. 93-88

In The

Supreme Court of the United States

October Term, 1993

NELSON A. FERNANDES,

Petitioner,

vs.

ROCKAWAY TOWNSHIP TOWN COUNCIL AND TOWNSHIP ENGINEER,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Township of Rockaway sold municipally-owned land no longer needed for public use to Petitioner Nelson Fernandes at an auction on September 21, 1985. This sale was conducted lawfully pursuant to N.J.S.A. 40A:12-1 *et seq.*

The Township Council authorized the auction in a resolution it approved on August 6, 1985. The sale of the municipal lands no longer needed for public use was to be subject to the following relevant terms and conditions:

. . . (f) All conveyance shall be by bargain and sale Deed with covenants against grantors acts. *No Affidavit of Title will be provided.* [emphasis supplied].

(h) This sale is made subject to such facts as an accurate survey may disclose, existing tenancies, rights of persons in possession, zoning ordinance, easements, existing conditions, covenants, and restrictions, codes and ordinances of the applicable municipalities, County of Morris, State of New Jersey and the *United States of America.* [emphasis supplied].

(i) No representations or any kind are made by the Township of Rockaway as to the condition, area or boundaries of the property herein relevant. *Said premises are being sold in their present condition "as is."* [emphasis supplied].

(j) If the title to this property shall prove to be unmarketable, liability of the Township of Rockaway shall be limited to repayment to the purchaser of the amount of his other deposit and the balance of the purchase price (if paid) . . . *Notice of the alleged defects of title or claim of unmarketability shall be given to the Township of Rockaway in writing not less than thirty (30) days after the sale.* The successful bidder agrees that the failure to give such notice shall be deemed conclusive evidence that the purchaser accepts the title in its then present condition. [emphasis supplied].

(k) Bidders are advised that no employee, agent or official of the Township of Rockaway has any authority to waive, modify or amend any of the conditions of sale therein provided.

(l) It is conclusively presumed that a bidder, prior to making his or her bid, had done the following:

1. Checked the exact location, including the correct street address, boundaries and the size of the property.

2. Checked the zoning restrictions to ascertain the current legal use of the property.

3. Made a personal inspection of the property prior to bidding.

These terms and conditions make it unmistakably clear that at the auction, purchasers such as Petitioner, received nothing more than marketable title to any land sold. The Township specifically refused to provide an Affidavit of Title to purchasers. It also told purchasers that the lands were being sold subject to existing easements, restrictions, and applicable local, county, state and federal laws and regulations, whatever those might be. By the terms and conditions of this sale, the onus fell on purchasers to determine whether what they planned to do on the property was legally feasible. Respondent Township was clearly not promising any purchaser that the potential "best and highest" use of that tract was permissible or feasible.

Petitioner offered the successful bid of $10,000 on Block

20504, Lot 8 located at 15 Cayuga Avenue within the Township. The lot was smaller than the minimum size set by the Township's zoning ordinance and residential development. A portion of the lot was also covered by environmentally-sensitive freshwater wetlands. However, Petitioner, an experienced home builder and/or speculator in undeveloped property, knew the lot was undersized and did inspect the subject property. After his inspection, he decided to purchase. He later purchased the adjacent Lot 9, planning to subdivide the two lots into two "buildable" lots.

At the time of his successful bid, Petitioner signed a form entitled "Auction Information for Bidders for Properties being Sold for Rockaway Township." This form described the terms of the sale including the requirement to sign a contract, and deposit with the Township $500 no later than two days after the auction. It also contained the following paragraph which is relevant to the case at bar:

> *Acceptance of a Bidding Number indicates that the Bidder has read, understands, and agrees to these terms and conditions, as well as the provisions of the Township's published resolution and contract, which together with this information form the terms and conditions of this sale . . . I have read and accepted these terms and conditions.* [emphasis supplied].

Petitioner took title to the lot at 15 Cayuga Avenue, with the assistance of the law firm of Somer & Englehardt, by deed recorded with the Morris County Clerk on November 15, 1985. Petitioner had a title search done at the time of the purchase but chose not to pay for title insurance. Petitioner claims to have conducted, at approximately the same time, percolation tests on Lots 8 and 9 and those tests purported to indicate that a below-ground Individual Septic Disposal System (I.S.D.S.) would not be

feasible. As previously stated, Petitioner's intention was to build and sell a detached, single family dwelling on Lots 8 and 9. The Planning Board approved his application for a minor subdivision on October 20, 1986. Petitioner hoped to connect this home to the municipal sanitary sewer line that ran adjacent to his lots. This application was rejected, however, because of a grant condition imposed by the federal government in 1983 when it provided the Township with a portion of the money needed to build the sanitary sewer system to which Petitioner wished to connect. Petitioner's lots, according to the United States Environmental Protection Agency (EPA), are located in an environmentally sensitive area (ESA). Lots within an ESA cannot be connected to federally-funded sanitary sewers, in order to protect the wetlands which create an ESA designation, from sewer-induced development. The lots owned by Petitioner were designated as within an ESA and were two of approximately 140 lots in the Township impacted by the ESA grant condition prohibiting connections to the municipal sanitary sewer. Correspondence confirming this is dated September 30, 1983 from the consulting engineers who delineated the ESA's to then Township Mayor Wojtaszek.

The Township cooperated with Petitioner in his attempt to obtain a waiver from this ban, including allocation of sewer gallonage (subject to EPA approval) and approval of a wetlands waiver as part of his application for waiver to the EPA. But on May 5, 1989, the Rockaway Valley Regional Sewerage Authority (RVRSA) received a letter from the EPA's Acting Regional Administrator denying the request.

This law suit arose because Petitioner alleged that he is the owner of a worthless tract that can neither be connected to the municipal sanitary sewer, nor sustain a below-ground ISDS. Petitioner conveniently ignored the option of an above-ground ISDS for the lots in question.

Petitioner, appearing *pro se*, filed a lawsuit in the United States District Court, District of New Jersey, some time in early 1990. The cause of action asserted by the Petitioner arose under 42 U.S.C. § 1983, *i.e.*, the Township officials, under color of state law, acted to deprive Petitioner of his constitutional rights. The Hon. Maryanne Trump Barry, U.S.D.J., on November 29, 1990 entered an order dismissing the petitioner's complaint for failure to adequately state a claim for a violation of his federal constitutional rights. (Ra 1)[1].

The Petitioner subsequently filed a complaint in the New Jersey Superior Court, Law Division on December 4, 1990. The Township filed its answer on or about February 21, 1991, pursuant to a consent order permitting a late filing. Petitioner then filed a motion, returnable April 5, 1991, for "partial summary judgment" and subsequently, tacked on to that same motion, a request for a jury trial as well as permission of the court to allow the entry into evidence of videotaped depositions. In what respect the summary judgment was "partial" was not made clear by Petitioner's moving papers. Respondent Township made a cross motion to dismiss the complaint. The Petitioner's motion was denied while the Respondent Township's motion was granted with an exception by the Hon. John J. Harper, J.S.C. on July 10, 1991. Judge Harper's order, dismissed all counts except counts two and six. Count two alleged that Respondent Township violated the provisions of N.J.S.A. 40A:12-1 *et seq.* and by doing so, violated the Petitioner's constitutional right to due process. Count six alleged that actions of the Township or its agents constituted a "taking" without compensation in violation of his rights under the Fifth Amendment.

Leave to file an amended complaint with a supporting brief was filed with the federal district court by Petitioner on August 7,

---

1. "Ra" refers to Respondents' Appendix.

1991. Respondent Township filed its brief in opposition on or about August 8, 1991 and a response was filed by the Petitioner on August 30, 1991. Judge Maryanne Trump Barry dismissed this matter and stated that "justice does not require this Court to grant Plaintiff leave to amend the Complaint." (Ra 7). Petitioner did not appeal the dismissal in the federal district court.

Respondent then filed a motion in New Jersey Superior Court, Law Division, to dismiss the remaining counts of Petitioner's complaint on or about August 10, 1991. This matter was adjourned pending the signing of the federal court order by Judge Barry. A motion to file an amended complaint in the New Jersey Superior Court, Law Division, was instituted by Petitioner and responding briefs were filed on or about October 10, 1991. Hon. Karen Russell, J.S.C., conducted a hearing in this matter on October 25, 1991 and the order dismissing the remaining counts was entered on January 3, 1992. (Pa 72)[2].

On December 3, 1991, Petitioner filed a motion for reconsideration. Respondent Township filed a responding letter brief on January 7, 1992. The jurist noted that "these claims are all either previously dismissed by Judge Harper, barred by the notice provisions of the New Jersey Tort Claims Act or beyond the applicable Statute of Limitations for Section 1983 claims as well as Plaintiff's counts filed to state a cause of action upon which relief can be granted as well are vague and conclusory." (Pa 70).

On May 20, 1992, the Petitioner filed a motion for summary disposition and sanctions with the Superior Court of New Jersey, Appellate Division. The Respondent, Township of Rockaway filed an answer on June 12, 1992.

The Superior Court of New Jersey, Appellate Division on June

---

2. "Pa" refers to Petitioner's Appendix.

23, 1992 denied Petitioner's motion and permitted the Respondent to rely on its motion brief and its merits brief. The matter was argued on December 9, 1992 before Judges Gaulkin and Stern. In a *per curiam* opinion, the Appellate Division found "no basis for disturbing the judgment," "no basis for the breach of contract claims advanced by Plaintiff" and they affirmed the judgment of the trial court. *Fernandes v. Rockaway.* (Pa 63).

On February 4, 1993, Petitioner filed a notice of petition for certification from the judgment of the Superior Court of New Jersey, Appellate Division with the Clerk of the New Jersey Supreme Court. The Township filed its brief in opposition to the petition for certification on February 18, 1993. The petition was denied by the court on March 15, 1993. (Pa 62). Thereafter, Petitioner filed a motion for reconsideration with the New Jersey Supreme Court urging the court to reconsider his petition. The court denied petitioner's request on May 11, 1993. (Pa 61).

On July 14, 1993 Petitioner served Respondent with his petition seeking a writ of certiorari with the United States Supreme Court.

Petitioner apparently claims that had he known of the EPA grant condition when the auction occurred, he would have made a different economic decision and not purchased the subject property. The Township should not be held responsible for the consequences of Petitioner's financial decisions. By the precisely stated terms and conditions of the 1985 auction, the Respondent Township promised to convey marketable title and nothing more. The EPA grant condition did not deny Petitioner marketable title and the Township conveyed the property pursuant to the terms and conditions which Petitioner had agreed to at the time of the sale.

The matters of federal and state law herein presented have been ruled upon by the state courts and have been upheld.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO JURISDICTION TO GRANT A WRIT OF CERTIORARI.

The petition submitted to the Court does not present questions for review that meet the criteria necessary for this Court to grant a writ of certiorari. A writ of certiorari is granted by judicial discretion only when there exists "special and important reasons therefore." Rule 10.1. To illustrate the character of reasons which may be deemed "special and important," Rule 10.1 refers to cases:

> [W]hen a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals or
>
> [W]hen a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court. [Rules 10.1(b), 10.1(c)].

In the case *sub judice,* there is not one single special or important reason articulated on which to grant certiorari.

> "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for there comes into play regard for the court's duty to avoid decision of

> constitutional issues unless avoidance becomes evasion.

Rice v. Sioux City Memorial Park Cemetery, 75 S. Ct. 614, 349 U.S. 70, 99 L. Ed.897 (1955). Certiorari should not be granted except in those cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion or authority between the courts. *Rice v. Sioux City Memorial Park Cemetery, supra,* 75 S. Ct. at 620, 349 U.S. at 79, 99 L. Ed. 897 quoting *Layne & Bowler Corporation v. Western Well Works,* 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 (1923). Here, petitioner has not presented to the Court any real and embarrassing conflict with another state court of last resort or in the decisions of this Court. There is simply no conflict whatsoever presented for consideration.

The questions presented for review are vague and unspecific. The petition is devoid of any authority to demonstrate a conflict. Petitioner has taken a scattershot approach in hopes that this Court will find an issue in which to grant certiorari. Notwithstanding the fact that Petitioner has presented his claims in the federal district court and in three levels of the New Jersey courts, the specific constitutional rights he seeks to vindicate remain unclear. The inference can be drawn, though not clearly stated, that a basis for the petition to this Court is primarily the Fourteenth Amendment through the Due Process Clause. Even assuming that Petitioner is seeking to bring a due process challenge under the Fourteenth Amendment of the Constitution, a claim he has not articulated with any specificity, the facts in this case do not support his contentions. The broad statement that he was "denied due process by the erroneous application of the statute of limitations" (Pet. p. i) has no basis most especially in light of the fact Petitioner filed his complaint well in excess of the two year statute of limitations.

Concerning issues of state law, again Petitioner fails to clearly articulate with any specificity where his rights have been violated. The judgments of the New Jersey courts are well reasoned and have applied the appropriate principles of law. *See* Appellate Division opinion (Pa 63, 66) and Law Division opinion (Pa 67, 71). When a judgment below rests on an independent and adequate state ground, the writ of certiorari should be dismissed, *Wilson v. Loew's Inc.*, 78 S. Ct. 526, 355 U.S. 597, 2 L. Ed. 2d 519 (1958) for "[o]ur only power over state judgment is to correct them to the extent that they incorrectly adjudge federal rights. And, our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn,* 65 S. Ct. 459, 463, 324 U.S. 117, 125-126, 89 L. Ed. 789 (1945). The judgment of the New Jersey state courts rests on adequate and independent state grounds as articulated in the opinions of the lower courts, *see supra* (Pa 63, 66, 67 to 71) nor are there any special or important reasons presented to disturb the judgment of the New Jersey courts.

Petitioner asserts that jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3) now 28 U.S.C. § 1257(a). In pertinent part the statute provides:

> (a) Final judgments or decrees rendered by the highest court of a state . . . . may be reviewed by the Supreme Court by writ of certiorari where the validity of a . . . statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution or laws of the United States . . .

Other than the mere assertion of jurisdiction under the foregoing statute, Petitioner cites no authority nor raises any challenge to the validity of the applicable federal or state law. In order for this Court to exercise jurisdiction on the grounds that a statute is repugnant to the Constitution, the challenge must be distinct and substantial. *House v. Road Improv. Dist.*, 45 S. Ct. 60, 266 U.S. 175, 68 L. Ed. 229 (1924). Petitioner's simple assertion, by way of single statement that the applicable state statutes are repugnant to the Constitution or to the laws of the United States without substantiation is insufficient grounds for this Court to grant a writ of certiorari.

Moreover, Rule 29.4(c) requires that a petitioner questioning the constitutionality of any state statute and the State is not a party thereto, must file the initial pleading with this Court reciting that 28 U.S.C. § 2403(b) may be applicable and be served upon the state attorney general. As petitioner has asserted jurisdiction pursuant to 28 U.S.C. § 1257(a) he has an affirmative duty to comply with the requirement for service upon the New Jersey Attorney General. His failure to do so rendered his petition defective.

II.

MATTERS OF STATE OR FEDERAL LAW WERE CORRECTLY DECIDED BY THE NEW JERSEY COURTS.

This action began when Petitioner filed a 42 U.S.C. § 1983 action in the federal district court for the District of New Jersey. The Honorable Maryanne Trump Barry, U.S.D.J. entered an order dismissing the complaint on November 29, 1990 for failure to adequately state constitutional rights. (Ra 1). Petitioner never appealed from Judge Barry's dismissal of his 1983 claim.

Thereafter, Petitioner brought his case to the Superior Court of

New Jersey which considered both the state and federal claims. In affirming the judgment of the trial court, the Appellate Division of the New Jersey Superior Court concluded:

> Particularly given plaintiff's acknowledgment of the "auction information" indicating the property was sold "as is," and acknowledging the "terms and conditions" of the property, and making the sale subject to "existing conditions, covenants and restrictions" of all relevant governmental entities including the United States of America and the Township, we see no basis for disturbing the judgment. [citation omitted]
>
> In light of those provisions, we see no basis for the breach of contract claims advanced by plaintiff. While plaintiff argues that "[t]he issue before the court is a breach of contract not a tort claim," and cites cases for the proposition "that contract issues are not subject to the Tort Claims Act, he cites no authority for the proposition that the Township would have a duty to disclose the condition to every buyer . . ." *Fernandes v. Rkwy Tp. Town Council* [Pa 64].

The Appellate Division further rejected the argument that N.J.S.A. 40A:12-13 barred the sale by the Township as "restricted pursuant to law." (Pa 65). While Petitioner references a state law governing the method of sale which public entities must follow when offering lands at public auction, *see* N.J.S.A. 40A:12-13, he nowhere alleges in what manner the failure to follow the provisions of this law, if there was a failure by Township officials, violated his federal or state constitutional rights.

Respondent conducted the property auction in strict accordance with the statute on August 5, 1985. The Township Council authorized the sale by resolution and conducted an open public sale at auction to the highest bidder, the Petitioner, after an advertisement in local newspapers within the specified time required by statute. N.J.S.A. 40:12-13(a).

Thus, assuming *arguendo* that Petitioner did demonstrate failure on behalf of Respondent to conduct the auction pursuant to statute, he has exhausted his legal remedies in the state courts and has not been denied due process.

> Where a state has provided reasonable remedies to rectify a legal error by a local administrative body . . . current authority indicates that due process has been provided, and that section 1983 is not a means for litigating the correctness of the state or local administrative decision in a federal forum . . . [One's right to] property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under relevant state statutes. *Creative Environments, Inc. v. Estabrook,* 680 F.2d 822, 832, n. 9 (1st Cir. 1982), *cert. denied,* 459 U.S. 989 (1982).
>
> A mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where state courts are available to correct the error. *Chiplin Enterprises v. City of Lebanon,* 712 F.2d 1524, 1528 (1st Cir. 1983).

There is no basis for petitioner's assertion that the sale by the Township was barred as restricted pursuant to law.

The petitioner's federal civil rights claim pursuant to 42 U.S.C. § 1983 was barred by New Jersey's two year statute of limitations. "To the extent plaintiff relies on tort claims because of the personal injury aspect of the federal claims, *see Wilson v. Garcia,* 105 S. Ct. 1938, 471 U.S. 261, 85 L. Ed. 2d 254 (1985), no timely notice was given as required by statute. *See* N.J.S.A. 58:8-8, -9" (Ra 65). Under New Jersey law, the two year statute of limitations applies to all personal injury claims, whether based on tort or contract, *Oroz v. American President Lines, Limited,* 259 F.2d 636 (1958), *cert. denied*, 79 S. Ct. 584, 359 U.S. 908, 3 L. Ed. 2d 572 (C.A. N.Y.) and is applicable to bar civil rights actions. *Cito v. Bridgewater Tp. Police Dept.,* 892 F.2d 23 (3rd Cir. 1989), *rehearing denied.* In the state proceedings, petitioner did not contest the applicable period of limitation in which to file his 1983 claim. (Pa 65). However, before this Court Petitioner now asserts his claim in an effort to secure jurisdiction. Furthermore, Petitioner now raises a jurisdictional claim under 42 U.S.C. § 2000d, a claim that was not raised before the state courts. The Respondent respectfully submits that Petitioner's acknowledgment of the proper application of the two year statute of limitations and failure to assert a claim under 42 U.S.C. § 2000d bars him from raising these issues before this Court.

Petitioner fails to set forth any error committed by the state courts in their determination which would indicate a result being repugnant to the Constitution or to any law of the United States or New Jersey. The state court properly decided the issues of federal and state law before it and the judgment of the state court should not be disturbed.

CONCLUSION

Based upon the foregoing reasons, it is respectfully requested that this Court should deny certiorari as the decision of state and federal law was correctly decided by the New Jersey courts, no conflict exists between the New Jersey Supreme Court and any state court of last resort or a United States Court of Appeals and Petitioner has failed to present a substantial question for review by the Supreme Court of the United States of America.

Respectfully submitted,

JOHN H. DORSEY
Counsel of Record
DORSEY AND FISHER
Attorneys for Respondents
714 Main Street
P.O. Box 228
Boonton, New Jersey 07005
(201) 334-1900

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED NOVEMBER 29, 1990

Civil Action No.
90-830 (MTB)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NELSON FERNANDES,

Plaintiff,

VS.

ROCKAWAY TOWNSHIP TOWN COUNCIL and TOWNSHIP ENGINEER,

Defendants.

ORDER

This matter having been opened to the Court upon the motion of plaintiff Nelson Fernandes ("plaintiff") for summary judgment, *see* Fed.R.Civ.P. 56(c), and upon the cross-motion of defendants, Rockaway Township Town Council, *et al.* ("defendants") to dismiss the complaint for lack of subject matter jurisdiction, *see* Fed.R.Civ.P. 12 (b) (1), and the Court having considered the submissions of the parties both in support of and in opposition to the above motions without oral argument, pursuant to the provisions of Federal Rule of Civil Procedure 78; and

it appearing that plaintiff filed an amended complaint in this matter on July 19, 1990, pursuant to 42 U.S.C. § 1983[1]; and

the Court first addressing the cross-motion to dismiss for lack of subject matter jurisdiction[2]; and

it being the opinion of the Court that "a complaint should not be dismissed for failure to sate a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *see Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Paolino v. Channel Home Centers,* 688 F.2d 721, 722 (3rd Cir. 1981); and

it being the opinion of the Court that "plaintiffs in civil rights cases are required to plead facts with specificity", *see Rotolo v. Borough of Charleroi,* 532 F.2d 920, 922 (3rd Cir. 1976);

---

1. 42 U.S.C. § 1983 provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .".

2. Although defendants have brought their motion pursuant to Rule 12 (b) (1), Fed.R.Civ.P., (lack of subject matter jurisdiction), the motion is more properly considered as one brought under Rule 12 (b) (6), Fed.R.Civ.P., (failure to state a claim upon which relief may be granted). *See Chiplin Enterprises v. City of Lebanon,* 712 F.2d 1524, 1528-1529 (1st Cir. 1983). There is no doubt that plaintiff has properly invoked the jurisdiction of this Court on the face of his complaint, or that he has attempted to state a claim for the deprivation of his civil rights. Plaintiff's right to recovery thus depends upon whether or not he has stated a claim which is cognizable under the Constitution and laws of the United States, and not whether his claim is one over which this Court possesses subject matter jurisdiction. *See Chiplin,* 712 F.2d at 1528. Accordingly, I will treat the motion as one brought pursuant to Rule 12 (b) (6).

Kauffman v. Moss, 420 F.2d 1270, 1275-1276 (3rd Cir. 1970), *cert. denied*, 400 U.S. 846 (1970); *Negrich v. Hohn*, 379 F.2d 213 (3rd Cir. 1967); and

it being the opinion of the Court that the requirement that civil rights complaints be pled with specificity is designed to "protect[] state officials from a deluge of frivolous claims and [to] provid[e] state officials with sufficient notice of the claims asserted to enable preparation of responsive pleadings . . ."; *see Colburn v. Upper Darby Tp.*, 838 F.2d 663, 666 (3rd Cir. 1988); *see also Rotolo*, 532 F.2d at 922; and

it appearing that, in attempting to articulate, with specificity, the particular constitutional rights, privileges or immunities of which defendants have deprived him, plaintiff states, *inter alia*, that defendants have acted so as to deprive him of "property . . . of property rights and due process", *see* Complaint at p. 1; and

it appearing that, in support of this contention, plaintiff alleges, in the main, that he was permitted and/or fraudulently induced into purchasing certain lots in Rockaway Township without proper disclosure by the Town Council of sewer use restrictions which had been imposed on the property; *see* Amended Complaint at pp. 2-3; and

it being the opinion of the Court that, even considering the supplemental papers plaintiff has filed in support of his motion for summary judgment, plaintiff has failed to adequately state a claim for a violation of his federal constitutional rights[3];

---

3. Notwithstanding the fact that plaintiff has already once amended his complaint, the specific Constitutional rights he seeks to vindicate remain unclear. While plaintiff references a state law governing the method of sale which public entities must follow when offering lands at public auction, *see* N.J.S.A. 40A:12-13,

(Cont'd)

Appendix A

IT IS on this 28th day of November, 1990

(Cont'd)
he nowhere alleges in that manner the failure to follow the provisions of his law, if failure there was, would also constitute a violation of his federal rights under the Constitution of the United States. Even assuming that plaintiff seeks to bring a procedural due process challenge under the Fourteenth Amendment of the Constitution, a claim which is not articulated with any specificity, I would have grave doubts as to the sufficiency of this claim *vis* a *vis* the facts as they now exist. *See, e.g., Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832, n. 9 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982) ("Where a state has provided reasonable remedies to rectify a legal error by a local administrative body . . . current authority indicates that due process has been provided, and that section 1983 is not a means for litigating the correctness of the state or local administrative decision in a federal forum . . . [One's right to] property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes."); *See also, Chiplin*, 712 F.2d at 1528 ("A mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct the error"). Thus, even assuming that plaintiff had properly and articulately set forth a procedural due process challenge, dismissal would be appropriate.

I also note that the same analysis would apply as to any "takings" challenge under the Fifth Amendment. Plaintiff has certainly not been deprived of all use of his property, *see, e.g., Bello v. Walker*, 840 F.2d 1124, 1131 (3rd Cir. 1988), and thus, even if articulately stated, this claim would be dismissed as well.

Finally, to the extent that plaintiff has alleged separate claims under state law, *see supra*, they are dismissed as well. *See, e.g., Lovell Mfg. v. Export-Import Bank of the U.S.*, 843 F.2d 725, 735 (3rd Cir. 1988) (dismissal of federal claims where no independent basis for jurisdiction exists).

While plaintiff is free to attempt to amend his complaint to comply with the specific pleading requirements regarding Section 1983 actions, *see Ross v. Meagan*, 638 F.2d 646, 650 (3rd Cir. 1981) (leave to amend shall be freely given), I would urge
(Cont'd)

Appendix A

ORDERED, that the amended complaint of plaintiff Nelson Fernandes is hereby dismissed without prejudice.

s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

(Cont'd)
plaintiff to consider airing his grievance within the courts of the State of New Jersey. If plaintiff has any claim at all, it would appear to arise exclusively under state law and, accordingly, it is in the state courts in which he should proceed in this non-diverse action. If plaintiff has any claim at all, it would appear to arise exclusively under state law and, accordingly, it is in the state courts in which he should proceed in this non-diverse action. If plaintiff feels he can still articulate a federal claim, the state court would be equally equipped to handle it, *see, e.g., Maine v. Thiboutot,* 448 U.S. 1 (1980), and he would thus avoid having to re-rile in state court in any event should it be determined at a later date by this Court that he has not, in fact, stated a viable federal claim, but only a state law claim. *See Lovell, supra.*

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW *JERSEY FILED SEPTEMBER 23, 1991*

Civil Action No.
90-830 (MTB)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NELSON FERNANDES,

Plaintiff,

VS.

THE TOWNSHIP OF ROCKAWAY, a Municipal Corporation of the State of New Jersey,

Defendant.

ORDER

This matter having come before the Court upon the motion of plaintiff Nelson Fernandes for leave to file an amended complaint out of time pursuant to Fed. R. Civ. P. 15(a); and the Court having considered the submissions of the parties both in support of and in opposition to the motion without oral argument pursuant to Fed. R. Civ. P. 78; and

it appearing that plaintiff initially filed a complaint with this Court on February 28, 1990 and subsequently filed an amended complaint on July 19, 1990; and

it appearing that this Court dismissed without *prejudice* plaintiff's amended complaint in an order dated November 28, 1990; *see Fernandes v. Township of Rockaway,* No. 90-830 (MTB) (D.N.J. November 28, 1990); and

it appearing that plaintiff filed a similar action in the Superior Court of New Jersey, Law Division, Morris County Docket Number MRS-L-5845-90, on December 4, 1990; and it appearing that the Superior Court of New Jersey, Hon. John J. Harper, J.S.C., by an order dated July 10, 1991, dismissed all but two counts of plaintiff's complaint, permitting plaintiff to litigate the remaining two counts and ordering that discovery continue; and

it being the opinion of the Court that leave to amend a complaint need not be given where justice does not so require; *see* Fed. R. Civ. P. 15(a); and

it being the opinion of the Court that, given the pendency of identical state court proceedings, justice does not require this Court to grant plaintiff leave to amend the complaint[1],

IT IS on this *23rd* day of *September,* 1991, hereby

---

1. Of course, whether to grant leave to amend a complaint is committed to the sound discretion of the district court. *Foman v. Davis,* 371 U.S. 178, 182 (1962); *Coventry v. U.S. Steel Corp.,* 856 F.2d 514, 518 (3rd Cir. 1988). In this case, justice clearly does not require leave to amend. I find cases dealing with federal court abstention to be informative on this point.

A federal district court may decline to exercise its jurisdiction "where the controversy may be settled more expeditiously in state court." *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, 662-63 (1978) (citing *Brillhart v. Excess Ins. Co.,* 316 U.S. 491, 494 (1942)). The question of whether to defer to state court proceedings is within the discretion of the district court. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 19 (1983).

(Cont'd)

Appendix B

ORDERED, that leave to amend plaintiff's complaint is hereby denied.

s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

(Cont'd)

The Supreme Court recognized in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818 (1976) the propriety of dismissing a federal action due to the existence of pending state litigation in the name of "wise judicial administration." *Id.* The Court in *Colorado River* enunciated several factors that would support such a decision. *Id.* These factors are to be applied pragmatically and flexibly, based on the realities of the case at hand. *Moses H. Cone*, 460 U.S. at 21.

First, a district court may consider the advantages of avoiding piecemeal litigation. *Colorado River*, 424 U.S. at 818. Clearly this factor weighs in favor of denying the motion now before me. All but two of plaintiff's claims have been adjudicated in state court, and the state court has ordered that discovery continue on the two remaining claims. To recommence proceedings on these two very same claims in federal court would be to needlessly bifurcate litigation which is more efficiently handled in one forum.

Second, a district court may look to the "priority" of the federal and state actions. The Supreme Court's decision in *Moses H. Cone* clarified that priority between forums is not merely a mechanical inquiry into which action was filed first. *Moses H. Cone*, 460 U.S. at 21. Rather, priority contemplates a comparison of how much progress has been made in each action. *Id.* Once again, the state court's substantial progress in resolving claims identical to those brought before this Court in the amended complaint counsels against granting plaintiff leave to amend.

Finally, I note that state courts have independent jurisdiction over § 1983 claims. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1 (1980). Thus, plaintiff's § 1983 claims can be adequately addressed in the ongoing state court litigation. *See Medema v. Medema Builders, Inc.*, 854 F.2d 20, 213 (7th Cir. 1988) (district courts should not decline to exercise jurisdiction in areas of exclusive federal jurisdiction).